July 15, 2004

Via Electronic Mail

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave.
Washington, D.C. 20551

Re: Regulation DD; Docket No. R-1197

Dear Ms. Johnson:

This comment letter is submitted on behalf of Fort Worth Community Credit Union in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment by the Federal Reserve Board ("FRB"), published in the Federal Register on June 7, 2004. The Proposed Rule would amend Regulation DD (Truth in Savings) to require depository institutions to provide additional information about overdraft protection programs. The Proposed Rule also would address issues regarding the marketing of such programs. Fort Worth Community Credit Union appreciates the opportunity to comment on this important matter.

In general, while we appreciate the desire of the Agencies to provide guidance to depository institutions on overdraft protection programs, we believe that the level of specificity in the Proposed Guidance will result in the imposition of significant costs and burdens on institutions as they seek to "comply" with the guidance. In addition, we are concerned that the guidance is so detailed that it will restrict institutions' flexibility in offering overdraft programs and actually could result in consumers being provided with fewer alternatives to address inadvertent overdrafts. Furthermore, we believe that a number of sweeping statements in the Proposed Guidance, particularly with respect to the sections on "Legal Risks" and "Best Practices," will create significant legal risks for institutions as private parties and others refer to the guidance to support legal claims. For these reasons, we encourage the Agencies to withdraw the Proposed Guidance or, alternatively, publish a revised proposal for additional public comment. As discussed below, we have a number of specific concerns about the Proposed Guidance.

Safety and Soundness Considerations

The Proposed Guidance provides that "overdraft balances should generally be charged off within 30 days from the date first overdrawn." (With regard to federal credit unions, a 45-day period generally applies under existing rules that apply to those entities.) The Proposed Guidance also states that even if an institution allows a consumer to cover an overdraft through an extended payment plan, the 30-day charge-off provision would apply.

We strongly disagree with this proposal, and believe that it is not necessary to achieve safe and sound banking practices and also could adversely impact consumers. Many consumers seek to repay overdrafts as quickly as possible. In addition, institutions actively pursue the prompt payment of overdrafts through the use of written and oral notices to consumers. However, numerous circumstances can arise due to, for example, the frequency or timing of payment by employers to consumers, unanticipated additional expenses, and unexpected travel, in which consumers simply are unable to repay overdrafts in full within 30 days of the overdraft. If an account must be charged off within 30 days, it can be more difficult to collect payment for such amounts. Alternatively, if an institution is not required to charge off an account until day 45, the likelihood of collection in that "additional" 15-day period can be enhanced because consumers may be far more willing to pay a sum before it is charged-off. Thus, we believe adoption of a 45-day charge off period, which also would be consistent with the time period that applies to federal credit unions, could enhance the ability of institutions to collect overdrafts and actually enable better risk management practices.

The Proposed Guidance also provides that, with respect to reporting requirements, overdraft balances should be reported as loans and overdraft losses should be charged against the allowance for loan and lease losses. The Proposed Guidance also states that when an institution routinely communicates the available amount of overdraft protection to depositors, the amounts should be reported as "unused commitments" in regulatory reports. We respectfully disagree with the approach and believe that it is more appropriate to net overdraft balances against deposits because no agreement exists with respect to the overdrafts. Furthermore, negative balances occur daily at institutions, without regard to overdraft protection programs, and these balances are not classified as loans nor are they subject to immediate charge-off policies. We believe that overdraft balances should be treated the same way. In addition, to the extent these balances are not treated as loans, available amounts also should not be reported as "unused commitments" in regulatory reports.

Legal Risks

Truth in Lending Act

The Proposed Guidance states: "[w]hen overdrafts are paid, credit is extended." The guidance then discusses the treatment of overdraft fees and finance charges under Regulation Z. We strongly disagree with this statement and urge the Agencies to delete it from any final Guidance provided, for the reasons discussed below. To the extent courts and other entities have reviewed this question they generally have concluded that an overdraft is not credit under the Truth in Lending Act, unless it is a line of credit established by written agreement. In addition, this statement introduces an element of unnecessary risk to institutions that offer overdrafts and could expose institutions to increased litigation. Furthermore, any determination or statement that an overdraft is "credit" should only be made in connection with a full discussion and consideration of existing legal precedent on this issue. Moreover, there does not appear to be any reason to include this statement since the guidance implicitly notes that overdrafts are not covered by Regulation Z because the fees are not considered finance charges. Finally, the FRB's recent proposed amendments to Regulation DD, which solely covers deposit accounts and not credit, makes it clear that overdraft programs are not credit.

Equal Credit Opportunity Act

The Proposed Guidance states that the prohibition in the Equal Credit Opportunity Act ("ECOA") against discrimination "applies to overdraft programs." While we believe that institutions should not discriminate against persons on the basis of race and other factors, we do not believe that the ECOA should be deemed to apply to overdraft programs. In particular, the ECOA applies to credit extensions and credit is defined as the "right" granted by a creditor to a person to defer payment of debt. The overdraft programs described by the Agencies do not involve a "right" granted by institutions. Moreover, the Agencies have provided no rationale or reason for the statement that the ECOA covers overdraft programs and such a statement will likely lead to significant litigation by individuals, without regard to any evidence of discrimination or improper treatment by institutions. Furthermore, as discussed above, because overdraft programs are part of deposit accounts, as the FRB's recent amendments to Regulation DD provide, these programs also cannot be deemed credit. For this reason, we believe it is essential for the Agencies to not include any discussion about the ECOA in any final guidance. Finally, the statement that overdraft programs that are not covered by TILA would generally qualify as incidental credit under Regulation B is simply too sweeping a statement, and should be deleted from any final guidance.

Best Practices

In general, the establishment of "best practices" can help institutions identify issues and approaches to disclose information and administer financial products and services. However, while several of the "best practices" set forth in the Proposed Guidance are helpful and appropriate, a number of the "suggestions," if adopted, would require institutions to implement costly and significant changes to their programs. In fact, several of the suggestions are simply not technologically feasible. Moreover, we are concerned that while the provisions are "best practices," agency examiners, courts, and other parties will view the provisions as requirements and expect institutions to comply with these provisions. As a result, we urge the Agencies to delete the provisions discussed below.

Marketing and Communications with Consumers

Fairly Represent Overdraft Protection Programs and Alternatives

We are concerned about the breadth of the suggestion that institutions "explain to consumers the costs and advantages of various alternatives to the overdraft protection program" and identify the risks and problems in relying on the program and the consequences of "abuse." We believe this suggestion micro-manages the way in which, and customers to whom, institutions provide information, and is unnecessary. In addition, providing a detailed cost-benefit analysis of the alternatives to overdraft programs could require the creation of a lengthy and complicated document. Institutions make available significant information about their products and services, including lines of credit and other products. This information is made available through numerous channels, such as their websites, via telephone, and in branches. It is simply unnecessary and inappropriate for the Agencies to dictate the marketing approaches used by institutions. As a result, we recommend deletion of this provision.

Train Staff to Explain Program Features and Other Choices

We discuss the suggestion that staff explain how to "opt-out" of overdraft services later in this letter.

Explain Check Clearing Policies

We strongly oppose inclusion of this provision. An institution's check clearing policies (i.e., the order of payment of checks) is, at most, tangentially related to an overdraft program. While institutions may disclose their policies, this provision is outside the scope of the purpose of providing information about overdraft programs and should be deleted. In addition, such policies can be very detailed because they relate to checks and other channels through which consumers can withdraw funds, and the Agencies suggestion of a "clear" disclosure could require a lengthy and detailed document.

Program Features and Operation

Provide Election or Opt-Out of Service

We strongly oppose the suggestion that institutions require consumers to "opt-in" before providing overdraft services or, alternatively, permit consumers to opt-out of an overdraft program. Consumers are fully apprised by institutions when institutions may honor an overdrawn item, instead of returning the item unpaid and having a merchant or other party assess a fee, in addition to the "NSF" fee charged by the account-holding institution. Providing an "opt-in" notice to consumers for overdraft programs is not supported by existing law, and we believe that institutions currently do not use such an approach. It would work great hardship on consumers and would result in consumers paying greater amounts for checks returned unpaid (due to merchant fees, for example).

Furthermore, there is no basis for requiring the provision of an "opt-out" notice to consumers. This would impose significant costs and burdens on institutions and likely would result in significant litigation, due to the potential creation of a consumer "right," by the provision of such notices. For example, questions could be raised as to whether the notice is clear, the scope of the right, and numerous other issues. We urge the Agencies to delete this provision.

Alert Consumers Before a Non-Check Transaction Triggers any Fees

We also strongly oppose the suggestion that institutions provide a notice to consumers, "when feasible" *before* completing a transaction, that a transaction may overdraw an account, for the reasons discussed below. First, it is unclear what "when feasible" means. Technologically, an institution could not implement such a requirement, and any such approach would require the expenditure of extraordinary sums. Second, because systems that permit access to funds do not operate in "real time," it is simply impossible to know whether, at the time of a withdrawal, a specific transaction will overdraw an account. For example, withdrawals at ATMs are not completed in "real-time." In addition, even if a transaction occurs in real-time, other transactions, such as withdrawals by check, are not integrated into the "real-time" evaluation of a

consumer's funds on deposit, and it is impossible to know, at that time, if a transaction will overdraw an account, because of the processing of other deposits and withdrawals.

We also disagree with the suggestion that institutions post a notice at their ATMs explaining that withdrawals in excess of the balance of funds in a consumer's account will access the overdraft. We believe such a notice would confuse or mislead consumers, and should not be adopted. For example, many consumers that use other institutions' ATMs do not have accounts with those institutions, and such a notice could confuse those consumers. In addition, a number of an institution's own customers may not have use of that institution's overdraft program. Such a disclosure at an ATM would confuse and potentially mislead these consumers. In addition, some overdrafts that occur may be processed by institutions by "sweeping" funds from other deposit accounts held by the consumer, or by use of a line of credit. The disclosure of only one type of program in which an overdraft may be honored likely will confuse consumers who have other programs in which withdrawals in excess of the balance may be honored. As a result, the Agencies should not adopt this provision.

Promptly Notify Consumers of Overdraft Protection Program Usage Each Time

While, in general, we agree that institutions should notify consumers when overdraft services have been triggered, we recommend the agencies modify this provision. In particular, we believe the reference to sending a notice to consumers "the day" the overdraft program has been accessed is not possible in many instances. For example, a consumer may use an ATM or write a check on "day 1" and the overdraft program may apply to that transaction, but an institution may not know until day 2 or 3 whether there has been, in fact, an overdraft, because transactions are not processed in real-time. In this case, it might be argued that the overdraft was "accessed" on day 1. Similarly, even when an institution "knows" that an overdraft program has been "accessed" on day 1, the institution simply may not be able to send a notice until the following day or, if the transaction occurs on a weekend or holiday, until two or three days later. As a result, we recommend this provision simply suggest that institutions "promptly" notify consumers of the overdraft. In addition, it may be desirable for notice to be provided through means other than email or by a paper notice, such as by telephone, to ensure speedy notice is provided. This provision should clarify that such notice can be provided orally, if that is deemed the most effective means of "delivery" by the institution.

Fort Worth Community Credit Union appreciates the opportunity to comment on this important matter. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact Fort Worth Community Credit Union

Sincerely,

Richard Howdeshell
President/CEO